LIN WEN-CHIH & ANOR *a*

v.

PACIFIC FOREST INDUSTRIES SDN BHD & ANOR

HIGH COURT SABAH & SARAWAK, TAWAU *b*
RICHARD MALANJUM J
[CIVIL SUIT NO: T-22-12 OF 1997]
29 JULY 2000

CIVIL PROCEDURE: *Action - Claim for outstanding sum - Terms agreed upon by parties for payment of outstanding sum - Whether non-compliance by claimant rendered debt extinguished - Non-occurence of defaulting events - Whether claim premature* *c*

The plaintiffs sold their shares in the first defendant company to the second defendant company. Following the sale in a letter ('exh. P2') to the plaintiffs, the second defendant guaranteed to pay an outstanding sum that was owed by the first defendant to the plaintiffs. *d*

It was a term of exh. P2 that the payment for the plaintiffs' purchase of timber products would be used as a set off against the outstanding sum. Also that the purchase should be made over a period of ten months to be delivered in four shipments. Cash payments *in lieu* of, would only come into play when the second defendant could not meet the plaintiffs' requirements. The plaintiffs placed only one order and the time period of ten months had expired. The plaintiffs now claimed for the balance of the outstanding sum. *e*

Held: *f*

[1] There was an admission of the outstanding sum being due which was confirmed by the second defendant in exh. P2. Although it was also an admission by the first defendant of the outstanding sum, there were certain terms imposed which the plaintiffs accepted, if not in writing, then through their conduct. Since the plaintiffs failed to comply with the terms stipulated in exh. P2 within the time specified or within a reasonable time after the expiry and since it was not shown that the events that could have triggered the payment of cash had arisen, the plaintiffs' claim was therefore premature. Also, as it was not specifically stated in exh. P2 that the failure to place the orders within the time frame stipulated would result in the extinguishment of the outstanding sum, the claim was therefore not extinguished. *g* *h*

[Claim dismissed; costs to be taxed unless agreed.] *i*

Case(s) referred to:
Ellis v. Allen [1914] 1 Ch 904 ***(refd)***
Gimstern Corp (M) Sdn Bhd & Anor v. Global Insurance Co Sdn Bhd [1987] 1 CLJ 123 ***(refd)***
Hirachand Punamchand and Others v. Temple [1911] 2 KB 330 ***(refd)***
London Syndicate v. Lord (CA) [1878] 8 Ch D 84 ***(refd)***
Malayan Banking Bhd v. PK Rajamani [1994] 2 CLJ 25 ***(refd)***
New Zealand Insurance Co Ltd v. Ong Choon Lin (t/a Syarikat Federal Motor Trading) [1992] 1 MLJ 185 ***(refd)***
Sharikat Eastern Plastics Industry v. Sharikat Lam Seng Trading [1972] 1 MLJ 21 ***(refd)***
State Government of Perak v. Muniandy [1986] 1 MLJ 490 ***(refd)***
Tan Chong Keng v. Vincent Lim Bak Keng [1986] 2 MLJ 327 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 29
Evidence Act 1950, s. 21

For the plaintiffs - Chung Thau Yong; M/s Shim Pang & Co.
For the 1st defendant - Wilson Chang; M/s Lawrence Chai, Peter Song & Wilson Chang
For the 2nd defendant - Kenneth Chong; M/s Chin Lau Wong & Foo

Reported by Raja Vishnu

JUDGMENT

Richard Malanjum J:

The Claim And The Defences

In this action the plaintiffs are claiming for the following relief, namely:

(i) the said sum of RM6,223,241.00

(ii) agreed interest on the said sum of RM6,223,241.00 at the rate of 11% per annum calculated on day to day basis from 27th October 1997 till realisation;

(iii) such other reliefs this Honourable Court deems fit to grant.

The defendants are disputing the claim and have raised several issues in defence. For the 1st defendant the issues raised are basically that the claim is premature and/or extinguished as a result of the default on the part of the plaintiffs in not complying with the terms stated in a document dated 12 November 1996 (exh. P2).

There were also set-off and counterclaim filed but these were withdrawn in the course of the hearing.

As for the 2nd defendant initially there were various points raised. But some were abandoned. Hence I would only deal with the remaining points in this judgment.

And since there are also common points raised by both the 1st and 2nd defendants I will deal with those first and consider the other points separately if necessary.

The Background Facts

The plaintiffs were once the directors and shareholders in the 1st defendant. The 1st defendant is a company incorporated in Malaysia and operated a sawmill until July 1998. The 2nd defendant is a company incorporated in Malaysia as well and a shareholder in the 1st defendant.

Briefly, the 1st defendant was formerly known as Veramex Sdn. Bhd. It was then under the control of the plaintiffs and their two other brothers. In March 1996 the 2nd defendant joined in. As of 28 August 1996 it is not in dispute that the 1st defendant owed the plaintiffs in the sum of RM10,134,000 (the outstanding sum). Such fact is evident by exh. P1 of even date and duly confirmed by the 2nd defendant.

And pursuant to a share sale agreement dated 12 November 1996 (exh. P3) the plaintiffs and their brothers disposed of their remaining interests in the 1st defendant to one Liu Ho-Tien who the 1st plaintiff (PW1) described as the representative of the 2nd defendant. It was also the evidence of the 1st plaintiff that following that sale he managed to obtain from the 2nd defendant a guarantee to pay the outstanding sum and that is shown in exh. P4. And there is the letter issued by the 1st defendant to the plaintiffs dated 12 November 1996 (exh. P2) containing confirmation and undertaking in relation to the outstanding sum. It is also not in dispute that there was a reduction of the outstanding sum when the 1st defendant upon the order by the plaintiffs delivered one shipment of wooden laminated board leaving a balance the amount of which itself is in dispute between the parties. The plaintiffs put the balance of the outstanding sum as at 27 October 1997 to be RM6,223,241 whilst the 1st defendant gives the figure of RM5,431,454.87 as at 15 September 1997. It is the payment of this balance of the outstanding sum that is the subject of this present action.

The Evidence

The evidence of PW1, other than what has been referred hereinabove, also alleged, *inter alia*, that he had no choice but to accept the terms of exh. P2 in order to secure payment of the outstanding sum. And although initially he was adamant in saying that there were orders placed for the supply of plywood, when under cross-examination he conceded that there was in fact only one order whilst the rest were only enquiries. And his explanation for the cause of such a situation was that the parties could not come to an agreement on the prices.

As for the testimony of the 2nd plaintiff, Lin Wen Chuan (PW2), *inter alia*, he confirmed that there was only one shipment of plywood from the 1st defendant made in connection with exh. P2. Nevertheless this witness initially testified under cross-examination that many orders were placed to the 1st defendant for the supply of plywood. But finally this witness agreed that there was in fact only one order made while the other contacts with the 1st defendant were negotiations on the prices. And he said that even for that order the price was increased by US$20 per cubic meter after the ship had arrived at the Tawau Port. PW2 further said that an order could only be made after the prices had been agreed. One other pertinent piece of his evidence is his admission that he seldom took part in the then management of the factory of the 1st defendant and hence he would not know the capability of the machines in term of the size of plywood they could produce.

When referred to exh. P2 this witness said that he only knew that the outstanding sum would be paid in four instalments within ten months and that the payments would be in the form of products sales.

For the 1st defendant two witnesses were called. DW1 - Anthony Chong Chiew Bin in his evidence, *inter alia*, said that the plaintiffs only resigned as directors of the 1st defendant on 12 February 1997. And according to this witness the plaintiffs were still acting as directors of the 1st defendant as late as end of January 1997.

The evidence of PW2 - Tan Kim Chuan @ Tan San Lau substantially dealt with the operation of the factory of the 1st defendant. He gave the sizes of plywood the machines in the factory could produce and went on to say that the large sizes requirement of the plaintiffs could not be accepted. PW2 further said that even if the factory could produce the required sizes of plywood the products would not be trimmed, sanded and graded. And such product would not therefore be considered as finished product for export and hence contrary to the stipulation in the factory licence of the 1st defendant.

As regards exh. P6 (A and B), DW2 testified that it was written to seek confirmation from the plaintiffs with the view to write off the outstanding sum from the accounts of the 1st defendant.

Under cross-examination by learned counsel for the plaintiffs DW2 disclosed that the factory ceased operation in July 1998. And the quantity of plywood produced up to June 1998 was 11,500 cubic meters.

In respect of exh. P6 (A and B) this witness agreed that there was nothing written therein to say that on the lapse of the ten months the outstanding sum could be written off.

The Issues

There is no denial by the defendants that the balance of the outstanding sum remains unpaid. But what they are now saying is that due to the plaintiffs' own default in not complying with the terms prescribed in exh. P2 the obligations indicated in exh. P1, exh. P2 and exh. P4 would have lapsed and any balance of the outstanding sum would no longer be payable. Basically therefore, it is the consideration of such alleged default with reference to the terms contained in exh. P2 in particular that should determine the outcome of this case. Of course the 2nd defendant has also raised other issues relating to exh. P4 but that will be dealt separately if necessary.

Is The Plaintiffs' Claim Premature And/Or Extinguished?

In order to consider these issues it is essential that a close examination of the following documents should be made, namely, exh. P1, exh. P2, exh. P4 and exh. P6 (A and B). And for convenience it may be necessary to reproduce here the contents of those documents in toto. Shorn of the formalities the documents state thus:

(i) Exh. P1:

> We, the undersigned hereby confirm that the Total Net Balance due to Lin Wen Chuan and Lin Wen Chih ("The Lins") from Veramax Sdn. Bhd. as of current date is RM10,134,000 to be accounted for in the books as follows:
>
> 1. Due to Mr Lin Wen Chuan - RM5,134,000
>
> 2. Due to Mr Lin Wen Chih - RM5,000,000
>
> There are no other claims whatsoever from The Lins and their related companies against Veramax Sdn. Bhd. other than the sum stated above.

Dated this 28th day of August 1996

... ...

Lin Wen Chuan Lin Wen Chih

Confirmed by: MYCOM BERHAD

(ii) Exh. P2:

12 November 1996

Our Ref: FIN/96/L/0080

To: Lin Wen-Chuan &

Lin Wen-Chih
both of KM9, Jalan Apas
Tawau, Sabah

Dear Sirs,

Re: Outstanding sum of RM 10,134,000.00 and Provision for taxation of RM 3,295,453.00

We refer to the above and hereby acknowledge that a sum of RM10,134,000.00 ("the Outstanding Sum") as agreed on 28/8/96 is presently owing by us to you in the following proportion:-

1) Lin Wen-Chuan - RM5,134,000.00

and

2) Lin Wen-Chih - RM5,000,000.00

We hereby confirm and undertake with you as follows:-

1. we shall pay you interest on the Outstanding Sum or the balance thereof outstanding from time to time on monthly rests at the rate of eleven per centum (11%) per annum calculated day to day from today to the date of full payment thereof ("the Agreed Interest");

2) we shall sell and you shall purchase timber products manufactured by us ("the Timber Products") at a price consistent with the prevailing market price and costing the same amount as the Outstanding Sum plus the Agreed Interest ("the Timber Products Price") from us over a period of ten (10) months from today and to be delivered over four (4) shipments;

3) the Timber Products Price shall be deducted from and set-off against the Outstanding Sum and the Agreed Interest;

4) subject to item 5 hereinafter contained, the Outstanding Sum and the Agreed Interest shall be repaid by us to you only by way of deduction from and set-off against the Timber Products Price;

5) in the event that we shall fail, refuse and/or neglect to supply any of the Timber Products ordered by you or if any of the Timber Products supplied by us shall not be in accordance with the specifications stated in your purchase order(s), you shall be entitled, after giving us thirty (30) days' notice in writing to supply the Timber Products or replace the defective Timber Products and we have failed to do so, to cancel the order for such Timber Products or reject such Timber Products. Upon the order for such Timber Products being cancelled or such Timber Products being rejected and returned to us, we shall then pay cash *in lieu* of such Timber Products to you and such cash payment shall be deducted from and set-off against the Outstanding Sum and the Agreed Interest;

and

6) in the event that the final amount of income tax payable by us as assessed and raised by the Director General of Inland Revenue for the period up to and including the 30th day of September, 1995 shall be less than the provision for taxation in our accounts i.e. RINGGIT MALAYSIA THREE MILLION TWO HUNDRED AND NINETY-FIVE THOUSAND FOUR HUNDRED AND FIFTY THREE (RM3,295,453.00) only, we shall pay the difference thereof to you within FOURTEEN (14) days of receipt of the final notice of assessment from the Director General of Inland Revenue for the appropriate tax relief/rebate within THIRTY (30) days after completion of the Share Sale Agreement dated 12/11/96 between yourselves, Lin Wen-Fu and Lin Wen-Cheng jointly and severally of the one part and Liu Ho-Tien of the other part and keep you informed of such application from time to time.

Yours faithfully,

...

Bobby Yeap
Managing Director

cc: file

(iii) Exh. P4:

12 November 1996
Lin Wen Chuan &
Lin Wen Chih
both of KM 9 Jalan Apas
Tawau
Sabah

Dear Sirs

RE: OUTSTANDING SUM OF RM10,134,000 PAYABLE TO YOU BY PACIFIC FOREST INDUSTRIES SDN BHD (FORMERLY KNOWN AS VERAMAX SDN BHD) ("THE COMPANY")

In consideration of you selling your 7,500,000 ordinary shares fully paid-up in the Company to Liu Ho-Tien ("Purchaser") and for this purpose to enter into a Share Sale Agreement with the Purchaser upon such terms and conditions as are therein contained, we hereby guarantee the payment of the Timber Products Price and The Agreed Interest by the Company to you within the time stipulated in the letter of even date from the Company to you ("the Company's Letter").

In the event that the Company shall fail to pay you the Timber Products Price and/or The Agreed Interest in full by the time stipulated in the Company's Letter, we shall pay you the same or any balance thereof then outstanding within fourteen (14) days from our receipt of written notice from you to do so.

Words and expression used herein shall have the same meaning and intent as in the Company's Letter.

Yours faithfully
MYCOM BERHAD

DATO' YAP YONG SEONG
Group Managing Director

(iv) Exh. P6A and P6B:

10 November 1997

Our Ref: FIN/97/L/0172

SHIM, PANG & CO
2nd Floor, TB 265, Block 27
Fajar Complex, Jalan Mahkamah
P.O.Box 60193, 91011 Tawau
Sabah

Dear Sir,

Re: Outstanding Account With Mr Lin Wen-Chih & Mr Lin Wen-Chuan

We refer to your letter of 27/10/1997.

Attached herewith is a copy of our statement of account which showed the sum due to the abovenamed is RM 5,431,454.87.

We shall be grateful if you could enlighten us as to how the sum of RM 6,223,241.00 is arrived at.

Thank you.

Yours faithfully,

for Pacific Forest Industries Sdn Bhd

...
cc: HQ – KL

PACIFIC FOREST INDUSTRIES SDN BHD

Mr Lin Wen-Chuan & Mr Lin Wen-Chih Statement of Account

	Lin Wen Chih	Lin Wen Chuan	Total
	RM	RM	RM
Agreed sum dated 28/08/1996	5,000,000.00	5,134,000.00	10,134,000.00
Less:			
Cash advance & Other taken [March to October 1996]	(84,466.62)	(143,349.81)	(227,816.43)
	4,915,533.38	4,990,650.19	9,906,183.57
Less:			
Yangzhou September 96 shipment balance not collected [USD 19,337.75]			(50,036.77)
Yangzhou marine insurance paid on your behalf [balance: 6941.23-6081.08-860.15]			(860.15)
Final HP instalment to be recovered from Quantum Propect Sdn Bhd			(933.75)

Lin Brothers/Shareholders expenses from April to August 96 [paid 8/10/96]	(170,437.90)
Excess payment from Dec 96 to Feb 97	(1,009.43)
Water charges [09/93 to 02/96]	(4,618.57)
Payment made to Revertex Finewaters on your behalf [paid on 15/04/97]	(5,000.00)
Balance Outstanding	9,673,287.00
Add: Interest at 11% from 13/11/96 to 12/09/97 [RM 9673287 @ 11% @ 10/12 = RM 886,717.98]	886,717.98
Less: Repayment (Plywood shipment on 15/09/97) [5001.0240 M3 @ USD 350 @ 2.93 = RM5,128,550.11]	(5,128,550.11)
Total Outstanding at 15/09/199	5,431,454.87

Now, it is the contention of learned counsel for the plaintiffs in his rather brief submissions that exh. P2 is an admission coupled with an undertaking on the part of the 1st defendant. And he cited s. 21 of the Evidence Act 1950 to substantiate his argument that an admission may be proved against the maker (the 1st defendant in this case) but not against the party relying on it (the plaintiffs). To further support his contention learned counsel referred to exh. P6 (A and B) which is a letter from the 1st defendant to the solicitors of the plaintiffs enclosing a statement of accounts with the balance of the outstanding sum given to be RM5,431,454.87 as at 15 September 1997. Learned counsel disagrees that exh. P2 is a contract or an agreement and even if so there is no provision therein for the debt to be extinguished in the event of any failure to place the necessary orders for plywood from the 1st defendant. Learned counsel for the plaintiffs therefore submitted that the point raised on the debt having been extinguished was an afterthought.

It was also denied that the effect of exh. P6 (A and B) was only an enquiry with a view to write off the debt.

As regards the placement of orders learned counsel for the plaintiffs submitted that his clients did make the orders by way of making enquiries and

negotiation on the prices. And an order according to learned counsel did not mean the issuance of a purchase order. Otherwise, he submitted, the plaintiffs could have just issued purchase orders without consultation and negotiation with the 1st defendant.

For the 1st defendant it was argued that the claim of the plaintiffs should be taken as premature as none of the defaulting events stipulated in exh. P2 had arisen. Learned counsel for the 1st defendant said that it was a condition and agreed upon by the plaintiffs that they should be paid in kind by way of four shipments of plywood to be produced by the 1st defendant and it would only be on the happening of certain events that cash payment would come into play. And learned counsel said that the sole order that was made clearly stated at p. 23 of exh. P8 that it was done pursuant to exh. P2. He asserted that the other enquiries were not orders and in fact there were no negotiations contrary to the position taken by the plaintiffs. It was also contended that even in the course of the enquiries the plaintiffs sought to order an unfinished product that would have been contrary to the licence of the 1st defendant. Meanwhile, it was claimed that the 1st defendant was at all material times in the position to meet the orders of the plaintiffs. And time was of the essence of the arrangement according to learned counsel. Even if not the plaintiffs should have made the orders within a reasonable time after the expiry of the ten months stipulated in exh. P2 that ended on 11 September 1997.

As for the 2nd defendant the points raised for the 1st defendant were adopted in disputing the claim. And in addition thereto it was submitted that since the events that would have triggered the claim for cash payment were yet to occur it should follow that there would be no question of the guarantee coming into play.

In rebuttal to the argument of learned counsel for the plaintiffs that exh. P2 should not be construed as a contract, learned counsel for the 2nd defendant submitted that in their own pleadings it was stated that the plaintiffs would rely on the terms of exh. P2 to its fullest effect. Indeed learned counsel pointed that the plaintiffs in their evidence did not at any time say that exh. P2 was not a contract or that it was not binding on them.

On the point of admission in relation to exh. P6 (A and B) learned counsel for the 2nd defendant submitted that for an admission to be effective it must be a clear admission of all the facts and not to some of them only. Learned counsel said that exh. P6 (A and B) only referred to the statement of accounts and not to the liability under cl. 5 of exh. P2.

Learned counsel also said that there was already an arrangement on the manner of payment of the outstanding sum. Therefore the failure to comply with the arrangement should result in the debt being extinguished.

The Findings

An admission was duly discussed in the case of *London Syndicate v. Lord (CA)* [1878] 8 Ch D 84 where Jessel MR said this at p. 90:

> Now I come to the second, which is the narrow view. It has been held in the Court of Chancery for many years, that an admission by an accounting party of a sum being due is sufficient to ground an order upon him to pay the sum into Court. There is not, as far as I know, any virtue in one mode of admission rather than in another. What the Court has to be satisfied of is that the Defendant has admitted the amount to be due. At one time it was supposed that the admission must be in an answer, and no doubt that was the practice of the Court of Chancery before decree. It was next settled that it need not be in the answer, but that it might be in an affidavit brought in by the Defendant or in an answer to a question which he could not help answering on an examination taken by direction of the master. Whether it was a compulsory statement on oath or a voluntary statement on oath was immaterial, because it need not be upon oath at all. A man may admit by his agent or solicitor that the sum is due; he may put in a formal admission to that effect without any oath whatever, or he may act in such a manner as to authorise a third person to admit for him. He may say, "I will admit that to be due which my accountant finds to be due. I will delegate to an accountant for me and on my behalf the right of stating the account for me, and I will admit that that is correct." There is no difficulty in doing that, and if the Court ascertains he has done it, the Court will act upon the admission. In this case it appears to me to be clear that that is the effect of what the Defendant Lord has done. He appoints his accountant to meet the other accountant and to settle between them what items are undisputed and what are disputed, and that is adopted by the Chief Clerk at his request. Now, that being so, what the accountant does binds him as being admittedly right. He cannot quarrel with it because it is done by his own accountant, and when we find they both agree, he cannot afterwards say that he is at liberty to dispute it for the purpose of payment into Court. It is a sufficient admission, at all events, for that purpose. I do not say it is a final admission, because even if a man has admitted in his affidavit or upon examination that a sum is due, and afterwards discovers he has made a mistake, the Court will, if he comes in due time, relieve him from the consequences of such mistake; but in the absence of something of that kind he is bound by the admission as long as it stands, and the Court is authorised to act upon it.

It was also held in the case of *Ellis v. Allen* [1914] 1 Ch 904 that in order to rely on admission there must be 'a clear admission of facts in the face of which it is impossible for the party making it to succeed.'

Hence, at the outset it is necessary to consider whether there was an admission arising from the documents executed by the parties. In this case there are the exh. P1, exh. P2 and exh. P6 (A and B) to consider. Now, there is no denial

that exh. P1 itself demonstrates that indeed there is an admission of the outstanding sum being due and confirmed by the 2nd defendant. However, there is exh. P2 to note. Although it was also an admission by the 1st defendant of the outstanding sum, there were certain terms imposed. As to the effectiveness of those terms it is a matter of interpretation of the document by this court. In the case of *Malayan Banking Bhd v. PK Rajamani* [1994] 2 CLJ 25 it was held that the law will always look beyond the terminology of the document to the actual facts of the situation and it is no longer a question of words but substance.

Having heard the evidence including the events leading to its issuance and having considered the contents in so far as exh. P2 is concerned I do not think there is any dispute as to the meanings and implications of the words used therein. There is also no doubt that it was issued by the 1st defendant. And the plaintiffs accepted it and in fact went on to attempt to observe the terms therein. That can even be seen from the submissions of their learned counsel who asserted that orders were placed pursuant to the said document by way of various enquiries. Unfortunately such a stand is not consonant with the evidence of the plaintiffs who both testified that there was only one order placed while many enquiries were made. Hence, the true position is that the plaintiffs proceeded to observe the terms of exh. P2 and the result is that there was only one order made out of the four orders contemplated. In fact the 1st plaintiff (PW1) said that there was no other order made since the price could not be agreed upon. I am therefore quite surprised when learned counsel for the plaintiffs remained adamant that orders were made and thus taking that position to argue that exh. P2 could be enforced as an admission. I would have thought it might have been more beneficial to consider whether the debt is still due regardless of the non-compliance of the terms in exh. P2.

Accordingly, I find that the parties considered themselves bound by the terms as stated in exh. P2 and in fact acted upon them. And although PW1 said that they had no choice but to agree since they were eager for the payment, nevertheless, I am of the view that having taken that position it would have been a matter of observing the terms therein. Nothing could have prevented them from placing their orders and waiting for the 1st defendant to meet them. As such I do not think it can be summarily dismissed the notion that exh. P2 formed the basis of an agreement of the parties pertaining to the settlement of the outstanding sum. Indeed I would say that exh. P2 may be an admission on the part of the 1st defendant but it was subject to certain conditions which the plaintiffs subsequently accepted, if not in writing then through their conduct.

Hence, I am inclined to agree with the contention of the learned counsel for the 1st defendant that since the plaintiffs failed to comply with the terms stipulated in exh. P2 within the time specified or within a reasonable time after the expiry and since it was not shown that the events that could have triggered the payment of cash had arisen the claim should therefore be taken as premature. In the case of *Tan Chong Keng v. Vincent Lim Bak Keng* [1986] 2 MLJ 327, a Singapore decision, LP Thien J speaking for the Court of Appeal said this at p. 330:

> Nonetheless, what they said represents the ordinary rule governing acceptance of a cheque or note in payment of a debt, which is this: the acceptance by a creditor of a cheque or note in payment of a debt or a part thereof is, in the absence of any specific agreement between him and the debtor or other party concerned, a conditional payment which operates to suspend the remedies of the creditor against the debtor in respect of the debt or the part, as the case may be, until the cheque or note has been presented and dishonoured. This rule is essentially based on an implication by law, and such an implication will not be drawn if there is any agreement or arrangement between the parties to the contrary or any circumstances exist which militate against such an implication.

(see also: *Sharikat Eastern Plastics Industry v. Sharikat Lam Seng Trading* [1972] 1 MLJ 21).

Meanwhile, there is another possible aspect of this case in that whether the claim should be allowed to proceed regardless of the performance by the plaintiffs of the terms therein. Unfortunately, to consider such an issue the pleadings filed by the plaintiffs should be looked at. It is trite law that parties are bound by their pleadings. (see: *State Government of Perak v. Muniandy* [1986] 1 MLJ 490). And in the case of *Gimstern Corp (M) Sdn Bhd & Anor v. Global Insurance Co Sdn Bhd* [1987] 1 CLJ 123 it was held that the issues that were not pleaded should not therefore be entertained.

On close examination of the statement of claim of the plaintiffs it is apparent that paras. 4 and 5 therein rely on exh. P2 and in para. 1 of the reply it is averred that the plaintiffs *via* Kamax Trading Limited placed not less than four orders. That of course is contrary to the evidence subsequently adduced. Yet it was still maintained in submissions that there were four orders placed. And since that is the clear stand taken I do not think it is therefore necessary for me to consider that other possible aspect of this case however tempting it may be.

In respect of exh. P1 and exh. P6 (A and B) I do not think they are of any help to the plaintiffs since they have not been taken as the bases for this claim. They were only referred to substantiate the assertion that the 1st defendant had made an admission in respect of the outstanding sum payable to the

plaintiffs. Indeed, I find that the whole claim of the plaintiffs is founded upon exh. P2 as shown in their statement of claim.

As to whether the debt has been extinguished due to the default on the part of the plaintiffs in not complying with the terms of exh. P2, I do not think it is necessary for me to answer that issue in view of the conclusion that I have arrived at hereinabove. In any event I should think that the imposition of the time frame in exh. P2 for the plaintiffs to place their orders does not necessarily mean that the same has become a limitation period for the parties in the sense that the claim would be automatically barred on expiry of that period. In the case of *New Zealand Insurance Co Ltd v. Ong Choon Lin (t/a Syarikat Federal Motor Trading)* [1992] 1 MLJ 185 it was held that cl. 19 of the insurance policy that provided the time frame to commence an action from the date of occurrence of loss or damage contravened the provision of s. 29 of the Contracts Act 1950 and thus void. And in this case it was not specifically stated in exh. P2 that failure to place the orders within the time stipulated would result in extinguishment of the outstanding sum.

For the reason above alone that this action ought to be dismissed with costs in so far as against the 1st defendant. And since the 2nd defendant is only the guarantor the claim against it should also fail.

Accord and Satisfaction

The principle of accord and satisfaction was also raised in submissions. It was the contention of learned counsel for the 2nd defendant that the claim should be subject to the principle of accord and satisfaction in that the terms in exh. P2 governed the relationship of the parties in so far as the outstanding sum was concerned. And of course the consequence if the principle applies in this case is that the debt should have extinguished.

With respect I do not think the facts of this case support the application of that principle. There is no question of the defendants making an offer lower than the outstanding sum in full settlement of the debt. What was agreed was only the mode of settlement. In the case of *Hirachand Punamchand and Others v. Temple* [1911] 2 KB 330 CA there it was held that the principle applied as the plaintiff accepted the payment of a lower sum for the earlier settlement of the debt and even though it came from a third party. This was what Fletcher Moulton LJ said at p. 339:

> I agree with the view expressed by Willes J. in *Cook v. Lister*. (1) The effect of such an agreement between a creditor and a third party with regard to the debt is to render it impossible for the creditor afterwards to sue the debtor for it. The way in which this is worked out in law may be that it would be an abuse of the process of the Court to allow the creditor under such circumstances

to sue, or it may be, and I prefer that view, that there is an extinction of the debt; but, whichever way it is put, it comes to the same thing, namely that, after acceptance by the creditor of a sum offered by a third party in settlement of the claim against the debtor, the creditor cannot maintain an action for the balance. That being my view, namely, that either the debt is extinguished, or that the Court will not allow the creditor to assert his claim, I will only say a few words upon two of the cases which have been cited on the subject. By the decision in *Foakes v. Beer* (1) the old doctrine that a debtor cannot discharge himself from his debt by payment of an amount smaller than that of the debt was recognized by the House of Lords as law of such old standing that it could not be challenged. This fully explains the decision in *Day v. McLea* (2), where a debtor sent a cheque to his creditor for an amount smaller than the debt, stating that it was in settlement of the debt. It was accepted, and yet it was held that there was no settlement. I have grave doubts whether *Goddard v. O'Brien* (3) was rightly decided, because, when the facts are looked at, it appears that the cheque was there given, not in substitution for the debt, but only as conditional payment of the amount, so that the case really stood on the same footing as payment of a less amount in discharge of a greater. But in the present case we are dealing with the question of the effect of money paid by a third person. In such a case there is no difference between payment of the total amount and payment of a portion of it only, so long as it is paid in settlement of the debt. If a third person steps in and gives a consideration for the discharge of the debtor, it does not matter whether he does it in meal or in malt, or what proportion the amount given bears to the amount of the debt. Here the money was paid by a third person, and I have no doubt that, upon the acceptance of that money by the plaintiffs with full knowledge of the terms on which it was offered, the debt was absolutely extinguished.

Estoppel

And estoppel was canvassed in that the plaintiffs should be estopped from further denying that they were not bound by the terms of exh. P2 since they never made such denial earlier. In view of the conclusion that I have arrived at hereinabove I do not think it is now necessary to consider this issue.

The Guarantee

Besides the common issues that were raised by both defendants to deny the claim, learned counsel for the 2nd defendant also submitted other points pertaining to the guarantee given as shown in exh. P4. One of them is that there was no demand made and thus the claim should be taken as premature.

On this point I do not think there is much to it as that is not a precondition in exh. P4. And in any event it cannot be taken that the 2nd defendant was unaware of the claim since there is exh. P7 which is a letter addressed to it.

Conclusion

I have also considered the other points raised by the respective counsel for the parties but I am of the view that my findings on them will not change the conclusion that I have arrived at herein. Accordingly, as it is my finding that the claim of the plaintiffs is premature in the light of the contents of exh. P2 the inevitable conclusion is that this claim against both the defendants must be dismissed with costs to be taxed unless agreed.